D.T.E. 98-13 (A-F)

Investigation pursuant to the Electric Restructuring Act, St. 1997, c. 164, §§ 239, 240 (G.L. c. 164, §§ 94G, 94G1/2) by the Department of Telecommunications and Energy, in order to consider whether granting exemptions from some or all of the requirements of G.L. c. 164, §§ 94G and 94G1/2 (including fuel charges, performance reviews, goal-settings and oil conservation adjustments) for Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company, Nantucket Electric Company and Western Massachusetts Electric Company (the "Utility Companies") is in the public interest.

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INTERLOCUTORY ORDER ON THE ATTORNEY GENERAL'S (1) APPEAL OF HEARING OFFICER RULING AND (2) MOTION TO COMPEL

I. APPEAL OF HEARING OFFICER'S RULING

- Introduction

On January 22, 1998, the Department of Telecommunications and Energy ("Department") opened an investigation pursuant to the Electric Industry Restructuring Act ("Restructuring Act"), St. 1997, c. 164, §§ 239, 240 (G.L. c. 164, §§ 94G, 94G1/2), in order to consider whether granting exemptions from some or all of the requirements of G.L. c. 164, §§ 94G and 94G1/2 (including fuel charges, performance reviews, goal-settings and oil conservation adjustments) for Boston Edison Company ("BECo"), Cambridge Electric Light Company, Commonwealth Electric Company (together, "COM/Electric"), Eastern Edison Company ("EECo"), Fitchburg Gas and Electric Light Company ("FG&E"), Massachusetts Electric Company ("MECo"), Nantucket Electric Company ("Nantucket") and Western Massachusetts Electric Company ("WMECo") (collectively, the "Utility Companies") is in the public interest. The matter was docketed as D.T.E. 98-13. Pursuant to notice duly issued, a public hearing was held at the Department's offices on February 10, 1998. Several of the Utility Companies and the

Attorney General filed written comments regarding the Department's proposal. No person commented at the public hearing.

In his comments to the Department filed February 4, 1998 ("Attorney General Comments"), the Attorney General proposed that the Department conduct a final audit of the fuel charge and performance review accounts in order to assure an accurate closure of this process (Attorney General Comments at 1). On February 20, 1998, the Department issued an Order directing each Utility Company to file by May 1, 1998, for Department approval, a plan for reconciling any over- or under-recovery in the fuel charge account and a proposal for exemptions from some or all of the requirements of G.L. c. 164, §§ 94G and 94G1/2 ("February 20, 1998 Order").

We also stated that:

Regarding the Attorney General's proposal for a final audit of the fuel charge and performance review accounts, the Department notes that all interested persons, including the Attorney General, will have an opportunity to examine the final reconciliation plans after they are filed on May 1, 1998. At that time, the Department will determine if additional review is warranted for the fuel charge and performance review accounts.

(February 20, 1998 Order at 3)

The Utility Companies filed plans in response to the February 20, 1998 Order on May 1, 1998 ("May 1 Plans"). Discovery was issued by both the Attorney General and the Department. As a result of procedural disputes involving WMECo and other parties, both in this proceeding and in its performance review and restructuring dockets, WMECo sought clarification of the scope of this proceeding on June 15, 1998 ("WMECo Motion for Clarification of Scope").

The Attorney General filed an Objection to WMECo's Motion for Clarification of Scope, which, in essence, renewed the request for a final, comprehensive audit ("Attorney General Objection"). Specifically, the Attorney General argued that all testimony and exhibits filed in this fuel charge reconciliation proceeding, D.T.E. 98-13, should be withdrawn and the final amount of the fuel charge reconciliation should be determined in each company's performance review proceeding (Attorney General Objection at 3). The Attorney General argued that the Department cannot relinquish its mandate to ensure that only prudently incurred costs are recovered through the fuel charge (id. at 2).

On August 4, 1998, the hearing officer issued a ruling on the outstanding procedural issues (Hearing Officer Ruling on: (1) WMECo's motion for clarification of scope and dismissal of certain information requests; (2) Western Massachusetts Industrial Customers Group's ("WMECo-ICG") petition for leave to intervene; (3) WMICG's motion to intervene late, to consolidate proceedings and in opposition to dismissal of

certain information requests; and (4) proposed procedural schedule ("Hearing Officer Ruling"). In denying the Attorney General's request, the Hearing Officer Ruling stated that:

The Attorney General intervened in countless fuel charge proceedings over the years at the Department. The purpose of these earlier proceedings was to ensure that only prudently incurred costs were recovered through the fuel charge, subject to refund if imprudence was determined to have occurred in subsequent performance review proceedings. Through his involvement or implicit acceptance of past fuel charge orders, the Attorney General has already accepted that those costs recovered through the fuel charge were prudently incurred. Presumably, the claim stems from the Attorney General's February request that the Department undertake a comprehensive audit of each company's fuel charge account, which was not granted.

(Hearing Officer Ruling at 6)

On August 10, 1998, the Attorney General filed an Appeal of the Hearing Officer Ruling ("Attorney General Appeal"). On August 12, 1998, WMECo filed a response to the Attorney General Appeal ("WMECo Response"). COM/Electric filed a response to the Attorney General Appeal on August 14, 1998 ("COM/Electric Response").

B. Positions of Parties

1. The Attorney General

The Attorney General contends that the Hearing Officer Ruling contradicted the February 20, 1998 Order by resolving the earlier request for an audit (Appeal at 2). The Attorney General further states that the public interest requires an audit of each company's fuel charge account (id. at 3). The Attorney General seeks clarification whether the Department has made a definitive ruling with respect to the Attorney General's request for audits (id. at 4). In addition, the Attorney General requests that the Commission overrule the portion of the Hearing Officer Ruling regarding the need for comprehensive audits (id.).

2. WMECo

WMECo argues that the Hearing Officer Ruling was correct because the Attorney General was an active party in all previous fuel charge proceedings that satisfied the requirements of G.L. c. 164, § 94G(b) (WMECo Response at 1). WMECo also states that implementing a comprehensive individual audit for each company is unnecessary (id. at 3). With regard to the Attorney General's request for a full audit, WMECo notes that the Attorney General had the right to appeal each and every fuel charge order pursuant to G.L. c. 25, § 5 (WMECo Motion to Dismiss Third Set of Information Requests at 2). WMECo claims that the Attorney General's "attempt to re-open these resolved cases to an audit at this time . . . is effectively an attempt to re-litigate each [fuel adjustment clause] filing" (id.).

3. COM/Electric

COM/Electric states in its response to the Attorney General's appeal that an audit of previously approved and litigated fuel charge filings would be unnecessary (COM/Electric Response at 1). COM/Electric also states that at no time during the more than two-decade history of the fuel charge statute did anyone contend that some further review or independent audit beyond the reviews being conducted was necessary or appropriate (id. at 3).[(1)] COM/Electric also argues that the Restructuring Act does not establish a requirement for a final audit of electric companies' fuel charges (id.).

Finally, COM/Electric argues that the Department must consider the scope of any audit before considering the Attorney General's request (id. at 4). COM/Electric states that Utility Companies do not have to retain fuel charge filings more than six years from a final order (id., citing Letter from Department to COM/Electric (October 25, 1996)). However, COM/Electric further states that if the audit did not cover the entire time from the inception of the fuel charge, it would be assuming the propriety of data and calculations up to that point (id.). COM/Electric concludes that such an audit would be contrary to the theory underlying the Attorney General's request (id.).

C. Analysis and Findings

The Department did not rule on the Attorney General's request for a comprehensive, final audit in our February 20, 1998 Order because it was premature. We stated that the issue would be revisited once the May 1 Plans were available. The Hearing Officer Ruling was issued on August 4, 1998, well after the May 1 Plans were filed. In fact, the Attorney General and the Department each conducted two rounds of discovery concerning the May 1 Plans. In ruling on WMECo's request for clarification of scope, the Hearing Officer addressed the audit issue because it was essentially part of the Attorney General's argument concerning the scope of the proceeding. Therefore, it was not necessary to request or provide for additional formal comment on the need for an audit before the Hearing Officer's Ruling determining that an audit was neither required nor appropriate.

The Attorney General's proposal regarding a comprehensive audit of the Utility Companies' fuel charges is inconsistent with the Department's intention in opening this investigation, i.e., to develop a plan for reconciling any over- or under-recovery in the fuel charge account. The Restructuring Act does not require a final audit. The fuel charge Orders were final Orders and, furthermore, there was opportunity for appeal at the time of each order's issuance. Little, if anything, would be gained by auditing finally adjudicated fuel charges under a statute dating from St. 1974, c. 625, § 1. Therefore, the Department denies the Attorney General's Appeal.

II. MOTION TO COMPEL

A. Introduction

On August 24, 1998, the Attorney General filed a Motion to Compel Responses to Third Set of Information Requests ("Motion to Compel"). Each of the Utility Companies filed responses objecting to some or all of the information requests as outside the scope of the proceeding and several of the Utility Companies asked that their responses be treated as responsive to the Motion to Compel.

B. Positions of Parties

1. The Attorney General

In his Motion to Compel, the Attorney General merely asserts that "there is no basis in law or fact for any of the objections the companies have made in order to avoid discovery" and that the "public interest" requires that the Utility Companies be compelled to provide the information requested.

2. The Utility Companies

The Utility Companies argue first that many of the Attorney General's third set of information requests are outside the scope of this proceeding, as set forth in the Hearing Officer ruling. In addition, the Utility Companies contend that the Hearing Officer ruling is consistent with the Department's February 20, 1998 Order. Several of the Utility Companies note that, according to our procedural rules, unless and until the Department reverses or stays the Hearing Officer Ruling, it remains in effect. Finally, WMECo contends that the information sought by the Attorney General will not lead to any information relevant to "resolving WMECo's March over-collection" of the fuel charge (id. at 3).

C. Standard of Review

With respect to discovery (i.e., information requests), the Department's regulations provide:

The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled. 220 C.M.R. § 1.06(6) (c)1.

Hearing officers have discretion in establishing discovery procedures and are guided, but not bound, in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq. 220 C.M.R. § 1.06(6)(c)2. Rule 26 provides in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action...

M.R.C.P. 26 (B) (1).

D. Analysis and Findings

The Attorney General's third set of information requests, which are the subject of the motion to compel, sought to elicit extensive and detailed information regarding audits of each company's fuel charge account going back at least seven years, and, in some cases, to the inception of the retail fuel clause. The information requests essentially amounted to an attempt, by other means, to conduct the comprehensive audit of fuel charge accounts which the Attorney General had previously requested. The Hearing Officer Ruling of August 4, 1998 stated that a comprehensive audit of each company's fuel charge account was inconsistent with the intention of the Department in commencing this investigation and outside the scope of this proceeding. The Attorney General's motion to compel is therefore denied.

III. ORDER

After due consideration, it is

ORDERED: That the Attorney General's Appeal of the Hearing Officer Ruling issued August 4, 1998 and his Motion to Compel Responses to Third set of Information Requests are denied.

By Order of the Department,

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Janet Gail Besser, Chair

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

1. The Federal Energy Regulatory Commission ("FERC") has conducted audits of utility books and records over this period. These audits have resulted in adjustments that were passed on through the fuel charge. These audits were not initiated by any parties involved in the fuel charge proceedings. The purpose of the FERC audits is to evaluate a utility's compliance with FERC accounting and reporting regulations, not to evaluate the prudence of fuel expenses.